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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6336

GEORGE HERMAN ROGERS,

Petitioner,

v.

UNITED STATES

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1) is reported at 488 F.2d 512 (1974).

The District Court judgment was rendered on jury verdict and no written opinion was entered.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1974. This court has jurisdiction under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

(1) Whether utterances by an individual that he is "going to Washington to whip the ass off" the President interspersed throughout attempted discussions about President Nixon's trip to Red China constitutes a true "threat" within the meaning of 18 U.S.C.A. 871(a) as interpreted by the United States Supreme Court in Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399 (1969); or whether such declarations, in the context of the conversation, merely constitute political hyperbole[1] in the nature of a verbal reprimand or crude method of stating political opposition to a course of action adopted by the President?

(2) Whether the statutory requirement of willfulness is met when the maker "voluntarily and intelligently *utters the words* as a declaration of an *apparent determination* to carry out the threat";[2] or whether the congressional intent was to proscribe the willful

[1] Hyperbole–(1) Extravagant expression that represents something as much greater or less, better or worse, or more intense than it really is, or that depicts the impossible as actual. (2) Extravagant expression used as a figure of speech. (Webster's New Dictionary)

[2] Ragansky v. United States, 253 F. 643, 645; Rogers v. United States, 488 F.2d 512 (1974) (Attached as Appendix 1).

utterance or publication of language with the intent or under such circumstances that the operative effect of the words constitute a "threat" to the President of the United States?

(3) Whether Congress could constitutionally promulgate legislation, which, as judicially construed punishes the use of a form of pure speech, without proof of any relationship between the utterances, its tendency, and the intent with which it is made, and the substantive evils at which the statute is directed?

(4) Whether repeating the statement to police officers in the course of their investigation and in response to the officers' questions may properly form the basis of separate and punishable offenses (counts) in an indictment?

(5) Whether a citizen of the United States can be convicted and sentenced to five years imprisonment, *plus* an additional five years supervised probation period, for thoughtlessly interjecting into attempted *conversations* about President Nixon's trip to Red China such statements as–"I am going to Washington and beat up Nixon."?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) 18 U.S.C.A. 871(a)

"Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict

bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President, or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

(2) First Amendment

"Congress shall make no law . . . abridging the freedom of speech . . . . "

STATEMENT OF THE CASE

In Criminal No. 20,255 of the docket of the United States District Court for the Western District of Louisiana, petitioner, George Herman Rogers, was charged in a five count indictment with knowingly and willfully making an oral threat to inflict bodily harm or take the life of the President of the United States in the verbal use of "threatening" language at the Holiday Inn in Shreveport, Louisiana, on March 24, 1972, in violation of 18 U.S.C.A. 871(a).

The Federal warrant for petitioner's arrest was issued on March 29, 1972. Petitioner was arrested at his mother's house in New Boston, Texas, on March 31, 1972.

On March 19, 1973, the case was continued to March 21, 1973 due to the fact that petitioner had not been

arraigned. Petitioner was arraigned and served with a copy of the indictment.

On March 21, 1973, trial was commenced, at which proceeding the following evidence was submitted before a twelve man jury:

(1) *Background of Petitioner*

The record clearly indicates that petitioner has at least a ten year history of chronic alcoholism. That petitioner suffers from a mental condition or personality disorder which is worsened by his drinking. Finally, two witnesses testified they were drinking "boiler makers" with petitioner from 9:00 o'clock A.M. to sometime after 10:00 o'clock P.M. on March 23, 1972.

(2) *Counts 1 through 3 of the Indictment*

At approximately 6:00 o'clock A.M. on March 24, 1972, petitioner entered the dining facilities of Holiday Inn to drink coffee. After being seated, petitioner attempted to engage those sitting around him in conversation. (App. 7). Closest to him were two waitresses seated two tables behind him. The waitresses testified they tried to "ignore" his attempts to converse; that he was acting "odd", "confused" and "irrational".

The topic which petitioner wished to discuss was President Nixon's recent trip to Communist China.[3] As one witness testified . . . "It . . . (the President's trip to China) was very much in front of us at that time . . " (App. 22). On the whole, petitioner's comments were not unique, merely stating his opposition to the

[3]The President left Washington, D. C., on February 17, 1972, arrived in Peking on February 21, 1972, and departed Peking on February 28, 1972.

President's foreign policies and, couched in the language of a modern-day nuclear-phobic, expressing his concern for possible repercussions from fraternizing with the "enemy".[4]

Only two aspects of Mr. Rogers' behavior distinguished his utterances from countless others heard around the nation: (1) His speech pattern was broken and confused; his vocabulary and phraseology were limited; and, generally, it is safe to say that petitioner lacked the eloquence of William Buckley and others who shared Petitioner's general opposition to President Nixon's policy; (2) Each of petitioner's monologues ended with an utterance that he was "going to Washington and beat the ass off Nixon."

After petitioner had made the same or similar utterances three times in the space of forty-five minutes, one of the waitresses called the police to have petitioner removed from the dining room "before they got busy".

(3) *Counts 4 and 5 of the Indictment*

Officer Thomas J. Page answered a call about a disturbance, of an unknown nature, at the Holiday Inn. (App. 24) Officer Page testified that after talking to the waitresses, he placed petitioner under arrest and gave him the Miranda warnings. Thereafter, Officer Page directed the following question to Mr. Rogers: "Did you make any reference to the President or make any threats to the President?" Petitioner,

[4]Each witness called by the prosecution, as to each of the five counts, testified that petitioner's "threatening" language was preceded by a soliloquy of the threat posed by Communist China and the continuing threat of nuclear war.

probably excited that someone was finally willing to talk to him, once again repeated his opinions and voiced his criticisms with regard to the matter. Petitioner added nothing new to his prior statements and, unfortunately, he left nothing out. Count Four.

Upon reaching the station, Officer Page delivered the petitioner to Detective William Burson, who continued the investigation. Petitioner was again advised of his rights and questioned with respect to the events which transpired at the Holiday Inn. Detective Burson testified that petitioner voluntarily discussed the incident and during the discussion repeated his criticisms. Tap Tap Tap–Got you again. Count Five. Fortunately for Mr. Rogers, he was not questioned by any other officers, but was transported to the V. A. Hospital.

There is some confusion whether the officers actually instructed the hospital attendants to "hold" the petitioner for further questioning; or whether they merely "assumed" such instructions had been left when it was subsequently learned that the United States of America was going to prosecute for this heinous offense. Detective Burson testified as follows:

"Q You said it is not unusual to be brought down for an interview and released?

A That's right.

Q Was Mr. Rogers released?

A I sent him back out–I forgot where it was at.

Q Did you tell Officer Page to take him wherever it was and dump him and release him?

A Right, Sir.

Q You didn't tell him to stay around and watch him?

A No, Sir.

Q Or to tell these people to hold him?

A No, Sir. To the best of my recollection I might have. I don't remember right now.

Q When Mr. Rogers left your office you were through with him?

A For right then, yes, Sir."

(App. 38)

At any rate, none of the attendants had knowledge of such instructions and the administrative records fail to corroborate these allegations. Thereafter, petitioner "walked off" the hospital premises and returned to his mother's home in New Boston, Texas.

A day or two later, Detective Burson *mailed* a routine report to the Federal authorities, who arrested petitioner seven days later.

On March 22, 1973, the case was submitted to the jury with the following instructions:

> "Although you as jurors are the sole judge of the facts, you are duty-bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you." (Tr. 172, lines 10 through 14)
>
> * * * *
>
> "A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is willfully made if in addition to comprehending his words, the maker voluntarily and intentionally utters the words as a declaration

> of an apparent determination to carry out the threat." (App. 51).

The jury returned a verdict of guilty on all counts of the indictment, but recommended "*extreme mercy*". (App. 52, 3.)

On May 4, 1973, petitioner was sentenced to five years on Count One; and on Counts Two, Three, Four and Five, for a period of five years on each count, to run concurrently with each other; execution of confinement as to Counts Two, Three, Four and Five suspended during good behavior, and petitioner is to be placed on supervised probation for a period of five years. A special condition of petitioner's probation is to join and actively participate in an organization of the Alcoholics Anonymous.

Thereafter, petitioner perfected an appeal to the Court of Appeals for the Fifth Circuit. Criminal No. 73-2094 of the docket of the Court of Appeals for the Fifth Circuit was heard on Monday, December 3, 1973. In a decision rendered January 14, 1974, the Fifth Circuit affirmed the conviction stating that the evidence was sufficient for the jury to "properly conclude that on *each* count appellant's conduct satisfied *both essential elements* of the offense–(1) a *true* threat, (2) knowingly and *intelligently* made."

In the District Court the jury applied the law as announced by the court and returned a verdict of guilty on all five counts of the indictment. The jurors submitted their verdict with a recommendation of *extreme* mercy (Emphasis theirs). This plea was in vain. We now come before this High Court, not seeking forgiveness or mercy for a criminal, but seeking a

proper construction of a heretofore broadly interpreted statute and demanding the justice which is the birthright of every citizen of this great nation.

I

SUMMARY OF ARGUMENT

After reading and analyzing the cases cited in this brief, the writer cannot help but wonder how the authors of those opinions would proceed. As will be discussed below, the government has criminally prosecuted, and is presently punishing a citizen for uttering words.

It was only alleged and proven that *one* morning, during the space of 45 minutes, petitioner made three statements that he "was going to Washington and (whip or beat) Nixon's ass." The statements were made in the presence of four individuals who testified that they tried to "ignore" him because he sounded "confused", "odd" and "irrational". The reason he believed Nixon deserved such "severe" reprimand, and probably the reason he sounded irrational to his listeners, was his belief that Nixon was making friends with our age old enemies–the Communists. A silly belief for sure, but not one that petitioner has held alone. It was not many years ago when we punished individuals who didn't fear communism enough. Petitioner also repeated these beliefs and sentiments, on the *same morning*, to two police officers who, we can suspect, were only willing to listen because they were *questioning* him as part of their jobs.

The prosecution has sustained this conviction on their *belief* that–

> "the offense denounced by the Statute is completed at the instant the statement is knowingly and willfully made."[5]

We should mention here that the government has not alleged nor attempted to prove (directly or indirectly) that the statements made on that fateful morning were expressions of belief as distinguished from passing thoughts.[6] If, as I appreciate the law, you cannot punish a man for firmly held beliefs, until these beliefs motivate intentional criminal acts, how much less so for thoughtless utterances. The prosecution has, however, displayed a *belief* they, as representatives of the law, hold fervently enough to act upon: the belief that persons who err in their thinking should have their beliefs amended through coercion and imprisonment, no matter how harmless and silly. This belief is to my mind more productive of direful consequences than any of the silly imaginings which Mr. Rogers was shown to have possessed.

To fully answer all questions raised by these proceedings and to organize such an argument with precise citation of authority would require pages upon

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[5]Government's brief on the merits, page 9. As authority they cite *U.S. vs. Stickrath*, 242 F. 151 (D.C. Ohio, 1917), a case I refuse to put any higher than this footnote.

[6]"The subsequent abandonment of the bad intent with which the threat was made does not obliterate the crime" *U.S. vs. Stickrath*, supra." Government's brief on the merits. As always the government presupposes the existance of a threat and therefore a crime.

pages of fruitless analysis of the exact meaning and scope of each case cited. I must leave to others more capable than myself the ungrateful task of trying to reconcile all those decisions. While it is recognized that the First Amendment is not without exception, those classes of utterances which are subject to prior restraints must be narrowly defined. Similarly, there are even narrower sets of circumstances where imprisonment for five years is warranted due to uttering words as a means of communication. Certainly we are not required to show more than that under the facts herein, a conviction cannot be sustained.

However, in an attempt to clarify our argument and reduce to a comprehensible number the many issues which are necessarily raised, I find it necessary to preface my remarks with a discussion of the subject matter. My comments will not be unique and I will, in fact, paraphrase and often lift bodily from the writings of this Court. Therefore, for purposes of this part, the cases hereinafter cited shall serve as a complete bibliography. Not only would exact citation be frought with the practical difficulties mentioned above, but such an attempt would be productive of greater harm. Unless we are to compromise judicial impartiality and subject this petitioner to a judgment based on the reasoning and impregnating atmosphere of the *Stickrath–Ragansky* era, the constitutionality of this conviction must be determined by principles established in cases decided during more tranquil periods. And, if those better reasoned decisions are to be used as a guide and not an an argument, it is absolutely necessary that we view them as a whole and distrust the easy generalizations which some, such as *Ragansky*, too readily lend themselves.

Before going any further, you and I must agree on certain usages of language I will adopt herein. To distinguish the descriptive mental concept (word) from the "reality" which is perceivable by the sensory mechanisms, I will refer to the latter as the world of form, action and result. In so doing, I neither suggest that it is the only terminology, or even that it is the best. However, since these proceedings have been allowed to go this far without the distinction being drawn, I must make some attempt to discuss the difference. As far as it is applicable to criminal law, the phrase I have adopted would appear to at least be accurate. Words and combinations of same which comprise a belief, in themselves harmless, must produce action to have any harmful result. This, I think,[7] is obvious. If I should sit in my closet and spew forth words to which man has ascribed the most vile and reprehensible meaning, no harm to anyone other than myself would result. The same, of course, is equally true of my belief that the President, for one reason or another, needs or deserves to have a swift kick in the derriere.[7] To suggest otherwise is to return to an age when men, for fear of witches, burned women.

Of course, men may proceed from common beliefs to very different acts. The belief that money is a necessity may motivate one person to study and work hard and motivate another to commit a crime. The intentional act in either case will determine the criminal liability and not the motive, for the crime is not the

[7]While I imagine many citizens, in moments when they were unable to or too lazy to better explain themselves, have felt this emotion during President Nixon's terms in office, I wish to assure any over-zealous guardian of the public welfare that, as used herein, this sentence is strictly to illustrate a point.

thought even though it proceeds to an intentional act. I may intend to deprive you permanently of your property only to subsequently learn that it was always my own. Since the crime was not completed, the thought or intent is not a punishable offense.

Crime is of course a generic word and not a description of any particular act. Perhaps in 1794 in this country, what petitioner said and did would have sustained a conviction for the crime of compassing and imagining the death of the king, who was then the constituted authority. But that which is a crime in one age or in one society may not be in another. It is therefore an absolute requirement of criminal law that all essential elements to prove the commission of a crime must be shown. If that which is part of the essence of the crime is missing, there is either no crime, or a crime of a different nature. If the former is true, the charges must be dismissed; and if the latter, the prosecution must proceed under the proper statute. Thus, if our society considers dereliction and alcoholism a crime, and not merely symptoms of an inner illness, it may only proceed under statutes enacted to punish for that offense.

An essential element of most crimes is specific intent. Or, a requirement that the act be done for the purpose of or at least under such circumstances that the actor should have forseen that his act would produce an offense punishable by law. However, there are many statutes in which mens rea is not a required element. Normally these statutes deal with minor or police offenses for which fines, at least in the first instance, are ordinarily the penalties. Always these statutes are

directed at acts which are, in and of themselves, harmful to the public. The statutes therefore act as a guard or prior restraint on any and all who may fall within its ambit. It is, in effect, a warning to act with impunity and at one's own risk.

When, however, the intentional act which my thought produces is merely the uttering of words, there are certain constitutional considerations which must underpin our analysis. To suggest that when we open our mouth we do so at our own risk, under penalty of imprisonment, is Constitutional error in the first degree. It remains then to determine under what circumstances the use of speech proper can be punished as a crime. By speech proper I would distinguish words used as a means of communication (either as keys of persuasion or to voice an opinion or describe future events) from those used as a trigger of action to circumvent thought or discussion. In the latter category would fall the yelling of "Fire" in a public place and, to my mind, the use of threatening language under such circumstances as to attempt to restrict or coerce the President in the function of his duties. Certainly, an anonymous phone call or letter does not invite discussion, and out of concern for the Chief Executive, immediate precautionary measures must be taken. Such an act, and not the words, but the act, would be punishable under the present statute without raising any serious free speech issues.

However, when words are used as a means of communication, the commands of the First Amendment necessarily dictate the scope of the law. The wisdom underlying this Amendment is the simple (but often misunderstood) truth that words, in and of themselves,

are not, and can never be, a substantive harm. If my thought produces action, that act may be legally reprehensible and, as an intentional act, criminally punishable; but, when my thought produces only the intentional act of uttering words, the harm is not the words, but if at all, the action produced by my utterances.

We have considered how men proceed from common thoughts to very different acts. It is equally important to realize that when men observe a common fact, they will give to that fact an interpretation based on their own experiences, knowledge, capacity, prejudices and fears. If, due to all those factors which give to each consciousness its own individuality, I should ascribe an erroneous significance to a fact and proceed to form in my mind wrongful thoughts, there is no immediate harm done. To punish me for this error is to punish me for my individuality, for my lack of experience, knowledge or capacity, and for what appears to you to be unwarranted fears or ignorant prejudice. The important question then is how to amend the error. By coercion and imprisonment is an old, tired suggestion which time has proven to produce only supression, conflict, and disoriented thinking. Eventually, these will inevitably produce hate and violence. The harmful result is due more to the ignorant use of power than the original error of thought. In a society where truth is the ultimate source of authority, discussion and better counsel are deemed sufficient when circumstances permit deliberation before action. Liberty is, in final analysis, the means as well as the end.

In light of this knowledge our Constitution places narrow limits on the suppression or punishment of the

use of words as a means to communicate thoughts. Under our form of government, no one can be criminally prosecuted for ideas and opinions which he believes to be true; not even for compassing and imagining the death of the king. However, if this opinion is expressed under certain conditions, its operative effect is inimical to substantial community interests. To prevent the substantial harm, Congress may pass legislation to punish those who knowingly and willfully express their opinions in such a manner or under such conditions which present an imminent danger of producing a real and substantive evil (which words are not). To this extent, I would suppose there to be a rational and constitutional basis for this legislation. It, in effect, regulates the manner and mode of expressing an idea.

However, no one would suppose or require Congress to determine and fully describe all the situations in which the evil is so imminent that discussion and deliberation would not be allowed to run their full course. The courts, in each case, must determine whether the conditions were such that to express this opinion there and then was likely to produce immediate and serious consequence. Unless these conditions did in fact exist, there is obviously no crime. This is so just as much as the fact that a thief can only be prosecuted when the "stolen" object actually belonged to someone else. And, unless the utterer was aware, or should have foreseen the existence of these conditions, there was no intentional act within the meaning of the statute. We must be very clear on this point.

Words, essentially harmless, are the method of communicating ideas and beliefs. Ideas and beliefs are

equally harmless unless acted upon. When we give birth to words through utterances, they produce thoughts and ideas in all who hear them when and as made. As often is the case, there are breakdowns in communications arising from differences as to the meaning of words or the significance of the idea. Whether an idea, once expressed, will produce action in another is determined more by the beliefs of the listener and the surrounding circumstances than by the words of the utterer. Any idea may be an incitement and might motivate action. Whether the response is that which the utterer intended will depend both on the significance he attached to the idea and his understanding of the conditions surrounding the utterance, as well as the significance and interpretation given both by the listener. If I should ascribe to an idea or belief the significance that immediate and violent action is necessary, and yet the idea is too foolish or specious to produce any action from my listener, am I to be punished for a foolish belief which has no tendency of producing real harm? Similarly, if I should publish an idea which to me merits discussion and deliberation and the circumstances are such as to permit both, and yet to the listener warrants immediate and violent response, am I to be punished for the significance he attaches to the idea? In either case, I think not.

Certainly, in the first instance, Congress must decide whether a danger exists which calls for a particular protective measure. But when a statute is valid only in case certain circumstances exist, the enactment of the statute cannot establish the facts which are in each case

essential to its validity. It must always remain open to one called before the law to defend on the grounds that there were not at this time such conditions as would justify application of an otherwise valid law. Therefore, to criminally punish a man for publication of an idea, three essential elements must be shown to have existed. It must be proven that he did in fact utter the words. Secondly, the utterance must have a tendency to produce a substantive harm which Congress may legitimately prevent. By a tendency, it must be understood to mean an actual imminent danger, under these circumstances, to produce the evil at which the statute is directed. It is not sufficient to show that under some circumstances or some conditions the utterance *might* have such an effect or tendency. To punish a man when no harm was likely to result, or was not even remotely possible, is to punish a man for his beliefs and in most cases for his ignorance. Finally, it must be shown that the utterer, with knowledge of the conditions and circumstances which give the act (utterance) its tendency, made the statements with the intention of producing the harm. Or, at the very least, that he should have foreseen the existence of these conditions and proceeded to act with utter disregard to the imminent and serious consequences which would result. To punish a man for anything less is to punish him for his beliefs, necessarily suggesting that his crime was the imaginations of his heart and the proof was the overt act of uttering words.

Congress of course can never predetermine all of these factors, and the courts must accept the responsibility of judging the evidence in each and every case. To disregard this responsibility and to give the

present statute the broad scope the prosecution suggests, would modify its clear purpose of preventing true threats against the President into a prohibition of any kind of contumacious criticism, honest or vicious, foolish or reasonable, specious or real; and in disregard to the language of the statute and the clear commands of the First Amendment, raise it into a means of suppressing and punishing any and all intemperate and inflammatory discussion, which was surely not its purpose.

In light of the principles fashioned by this Court, in the instant case we are missing two essential components of a sustainable criminal prosecution–(1) A crime (an utterance which has produced, or under the circumstances has a real and substantial tendency to produce a substantive evil which Congress may constitutionally prevent); and (2) A criminal (one who, with knowledge of the circumstances, makes such an utterance with the specific intent of producing the substantive harm.)

The Government has rejected every suggestion and has sustained its conviction on its belief that petitioner, on the morning in question, was completely competent; that he understood the English language, and with full comprehension selected his words to accurately convey his thoughts. If this is so, it must be admitted that he knew the act he described would never leave the world of mental concepts and take form in the world of action and result. And, that when he said "*if* I could kill the President", he was well aware that the "if" was at least greater than his desire, if not absolutely impossible. Surely, if petitioner did knowingly and intelligently make these statements with full use of his

faculties, they can only be considered as a figure of speech or hyperbole. It is equally certain that no matter how serious or with how much apparent determination the statements were made, they were not likely to incite his listeners to attempt the execution of the acts described. Finally, even if these statements had been communicated or were intended to have been communicated to the President, which they obviously were not, they would have no tendency to restrict or restrain him in the performance of his duties. Where was the crime, unless we are to say that it was his thoughts or the imaginations of his heart?

It is equally obvious that petitioner's statements were part and parcel of an expression of a thought, albeit foolish and "irrational". The statements were not made with the purpose of producing any of the evils at which the statute may constitutionally be directed. Nor were the conditions present which would have given to these statements a character which they otherwise did not possess. Where then is the criminal?

It is, as I have said, necessary that there be a specific intent, in the sense that I have explained, to constitute an attempt, and the existence of other conditions, to complete the substantive crime. I can only apologize for my inability to better explain myself and plead that these deficiencies be supplied by members of this Court.

In this case a sentence has been imposed of five years imprisonment and five years suspended probation for uttering thoughts which, under the circumstances, he had as much right to utter as the government had to publish the Constitution, heretofore vainly invoked by him. I would add, even if what I think the necessary

intent were shown, the most nominal punishment seems to me all that could possibly be imposed, unless petitioner is to be made to suffer not for what the statute clearly intends, but for beliefs which are obviously borne of ignorance and immaturity. And if ignorance and immaturity are crimes in this country, who among us is safe?

II.

Petitioner was brought before a Federal iudge and jury to answer a multiple count[8] indictment charging that:

> "Count One
>
> . . . . . George Herman Rogers, in the presence of Mary Reynolds, willfully and knowingly, did make an oral threat to inflict bodily harm upon the President of the United States in the verbal use of threatening language, substantially as follows:
>
> 'I am going to Washington and beat the ass off Nixon' (18 U.S.C. 871)"

The other four counts of the indictment are in substantially the same form, namely, that petitioner (1) uttered "threatening"[9] language; (2) in the presence of

[8]A count in an indictment charges a distinct and separate offense. Allegations, insufficient in themselves to form a complete charge, but becoming such a charge in connection with those preceding, will not be construed as a separate offense. 42 C.J.S., Indictments and Information, S. 152 p. 1081-1082.

[9]Since words are merely a description of the object (act) and not the object (act) itself, "threatening language" can only be supposed to mean – the description of a direful and real consequence if, through action, that which is described should be removed from the world of mental image and actually come to pass.

at least one other person; (3) and that thereby, had knowingly and *willfully* made a threat against the president.

This Court has on many occasions discussed the necessary contents of a sufficient indictment. In U.S. v. Hess, 124 U.S. 483, 486, 8 S.Ct. 571, 572, 31 L.Ed. 516, this Court, speaking through Mr. Justice Field, said:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited; . . . . . The general, and with few exceptions, ... the universal rule, on this subject is that all the material facts and circumstances in the definition of the offense must be stated . . . . . No essential element of the crime can be omitted . . . . ."[10]

We recognize that when a conviction is sustained by sufficient evidence and is otherwise in accordance with law, the indictment will be deemed to have served its function. However, proof of only that which was alleged in an insufficient indictment does not prove that a crime was in fact committed.

It could hardly be argued, under the interpretation given 18 U.S.C.A. 871(a) by the District Court and

[10]See also, U.S. v. Carll, 105 U.S. 611, 612, 26 L.Ed. 1135, wherein this Court said: "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; . . . . . U.S. v. Cruickshank, 92 U.S. 542, 23 L.Ed. 588."

Court of Appeals for the Fifth Circuit, that a motion to quash this indictment would have been sustained. Both courts only required for a valid conviction that the utterer: (1) "voluntarily and intentionally utter the words" with an apparent determination to execute the act thereby described; and (2) that under the circumstances and in the context used, the utterer should have foreseen that the hearers would so interpret his intention.

III.

Obviously, it has never been alleged that petitioner actually intended to hitchhike to Washington, wade through an entourage of Secret Service Agents, engage the President in "fisticuffs" and "whip (his) ass" or "beat (him) up". Nor was it asserted that had petitioner actually intended to execute the act described by his utterances, such was even remotely possible. Finally, there was no circumstantial evidence introduced from which it might be inferred that petitioner displayed the tendencies of a political assassin.

The validity of a real and substantial harm when an utterance is shown to be a manifestation of an actual intent has never been questioned. And, interpreting the statute with its greatest possible latitude, government action under 18 U.S.C.A. 871(a) might be warranted when, upon review of all the evidence, there is disclosed

an apparent intent or tendency (not "apparent determination") to harm the President.[11]

In connection with the possibility that upon review of all the evidence there is disclosed the tendencies of a political assassin, we should consider the dissimilarity of the facts presented by two of the cases which the Government and the Fifth Circuit cite as *blanket authority* for the *Ragansky* test.

In U.S. v. Compton, 428 F.2d 18 (2nd Cir. 1970), the defendant phoned the New York Police Department on April 14, 1969, and described in detail his plan to assassinate the President later that month. At trial it was disclosed that previously, on election night – 1968, defendant had been found on the 34th floor of the Waldorf-Astoria Hotel, one floor below a suite occupied by President-Elect Nixon. On that night defendant reportedly told a Secret Service Agent that "Nixon would never become President".

In U.S. v. Hart, 457 F.2d 1087 (10th Cir. 1972), Hart's brother phoned the F.B.I. office in Denver, Colorado, and reported that defendant was en route to Washington, D.C. to kill the President. After his arrest defendant described in detail his plans to execute the threat. A Secret Serice Agent testified that Hart's description of the positions of security stations in the White House, and locations of stairways used by the President, were entirely accurate.

[11] See Whitney v. California, 224 U.S. 357, 376, 47 S.Ct. 641,648 71 L.Ed. 1045 (1927), where in a concurring opinion Justice Brandeis said: "In order to support a finding of clear and present danger it must be shown that an immediate serious violence was to be expected or was advocated, or that the *past conduct* furnished reason to believe that such advocacy was contemplated."

In neither case was a serious free speech issue presented. The utterances were not part and parcel of any communication of ideas other than an accurate and detailed plan to execute the threat. I would not say that under the circumstances reasonable men might not determine that there were grounds to fear for the safety of the Chief Executive. The statement in U.S. v. Hart[12] notwithstanding, the finding that a true threat did in fact exist was not solely based on an intentional utterance made with an apparent determination, but due to the existence of other facts which gave to the words the character and quality of a threat. And in both cases the existence of these circumstances were known to, if not the product of, the utterer. There was a concurrence of an act, its tendency and the intent with which it was done, and the substantive evils which Congress may constitutionally prevent. I would not say that success alone would sustain a conviction.

Nor could it be said that these courts misinterpreted the wide range of protective measures which Congress left to their wise discretion.[13] In *Compton* the court imposed a three year suspended sentence with probation; and in *Hart* the trial court recommended psychiatric treatment.

In the case before us today the Government has deemed it sufficient to merely allege and prove that on

[12]Ibid, at page 1091: "maker had an apparent determination . . . . . is synonymous with true threat".

[13]18 U.S.C.A. 871(a) provides: "Whoever, knowingly and willfully otherwise makes any such threat . . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both."

one morning petitioner described a course of action which no competent man would ever attempt to execute. To infer from these statements that he in fact had more elaborate and feasible plans in mind would be equivalent to compassing and imagining that petitioner was compassing and imagining. The comments made were part of a specific criticism of Presidential policy based on petitioner's fears of Communism. While these fears were expressed in an "irrational" manner, it is highly probable that they were the result of fears expressed more "rationally" throughout this nation for the past half century. How ironic that these more "rational" fears were part of an expressed concern about a form of government which attempts to regulate thought and deprive an individual of his free will.

IV.

However, all this to the side, it is said that an actual intent to harm the President is not essential to a valid conviction under 18 U.S.C.A. 871(a); that there are in fact other substantive evils to which the statute is constitutionally directed. The Government contends[14] and apparently both lower courts agree:

> "The offense denounced by the statute is completed *at the instant* the statement is knowingly and willfully made . . . . The subsequent abandonment of the bad intent with which the

[14]Appellee's Brief on the Merits, filed in the Court of Appeals for the Fifth Circuit, at Page 9.

threat was made does not obliterate the *crime*. U.S. v. Stickrath, 242 F. 151 (D.C. Ohio, 1917); Pierce v. United States, 365 F.2d 292 (10th Cir. 1966)."

Certainly it is not the Government's suggestion that the *crime* or:

> "The original of his treasons proceeded from the imagination of his heart; which imagination was in itself High-Treason, albeit the same was proceeded not to any overt act . . . and the heart being possessed with the abundance of his traitorous imagination, and not being able so to contain itself burst forth in vile and traitorous speeches . . ." Trial of Sir John Perrot, 1 How. St. Tr. 1315, 1318 (1592).

Any suggestion that compassing and imagining the infliction of bodily harm or even the death of the President is a crime punishable under the laws of this nation would not merit serious consideration. It is therefore equally certain that proof of only the overt act of making such an utterance, without more, is not sufficient evidence that a *crime*, intentionally or otherwise, has in fact been committed.

We must therefore proceed on the assumption that if this indictment and conviction are sustainable at all, it must be on the premise that by uttering the words in the presence of at least one other person the *crime* is thereby completed.

In its brief on the merits the Government argues that by making such an utterance "with an apparent determination" an individual "*might* incite others" to harm the President. In early cases this fear was couched in the mystical terms that one might put "devilment"

in the minds of others. While discussion of this fear filled much of our early reports, and was in fact the *sole basis* for the *Ragansky* test, it has today lost much of its forcefulness to what I would suggest are better reasoned opinions.

V.

The broad interpretation given this statute in 1917-1918 can only be ascribed to the exigencies and fears of the era. It was a time of world war, revolution and anarchy. More importantly, it was passed and construed before the early First Amendment cases and in an age "when men, for fear of witches, burnt women."[15]

The unbelievable impact which utterances, without more, were feared to have on the minds of others is displayed in U.S. v. Stickrath, 242 F. 151 (D.C. Ohio, 1917). There the defendant was charged with uttering the following words:

> "President Wilson ought to be killed. It is a wonder someone has not done it already. If I had an opportunity I would do it myself."

The following soliloquy is illustrative of the reasoning and intense emotion displayed by the courts in these early opinions:

> "The act is expressed in plain and unambiguous terms . . . If there is any room left for its construction, such *construction* must be with

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[15]Whitney v. California, 274 U.S. 357, 376, 47 S.Ct. 641, 648, 71 L.Ed. 1045 (1927) (J. Brandeis, concurring).

reference to the history of the country, *to ascertain the reason . . .*

In this country sovereignty resides in the people, ... To threaten to kill (the President) or inflict upon him bodily harm stimulates opposition to national policies . . . . incites the hostile and evil minded . . . . is an affront to loyal and right thinking persons, enflames their minds, provokes resentment, disorder, and violence, is akin to treason, and is rightly denounced as a crime against the people. *The statute in question was enacted not only for the protection of the President* . . . but also to preserve the tranquility of the people and their peace of mind . . . . It was then known that there were some who, on account of erratic tendencies, or mistaken views, or want of sympathy with or even loyalty to our country, were unfriendly to its aim and might, by direction or indirection, or both, endeavor to embarrass and cripple it . . . and might by threats assail the President, and thereby inspire others to attempt his life . . . . The enactment was opportune *. . . . that there might hereafter be a deterrent to restrain the disloyal, erratic, misguided, or wickedly disposed.*"[16]

[16]Stickrath, ibid at p. 153. See also U.S. v. Jasick, 252 F. 931 (D.C. Mich., 1918) where the following is found at page 932: "There are two counts in the indictment. The threat made is alleged in the first to have been that 'if he could get to President Wilson he would shoot the blinded eye'. In the second count it is charged that the defendant threatened 'that if he got a chance he would shoot President Wilson'. *Other language is also alleged, showing a spirit of disloyalty to the United States on the part of the defendant and a desire to aid the enemy,* which language it is not necessary to set forth here . . . *The purpose of the statute was undoubtedly not only the protection of the President, but also the prohibition* of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicate a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the real peace and safety of the country. It *tends to create* among the anarchistic, lawless element, which is always present in this, as in every other country, *a suggestion which may lead* to most evil and harmful consequences. It arouses resentment and concern on the part of patriotic citizens; and in general it constitutes a breach of the peace and incitement to disorder and violence."

Under this interpretation of the statute the court held that it was unnecessary for the "threat" to have been made to the President personally, or intended to be brought to his knowledge; or that the indictment state in whose presence the threat was made.

In U.S. v. Stobo, 251 F. 689 (D.C. Del., 1918) once again the court's emphasis was on the effect that the utterance would have on the mind of anyone who heard the utterance "when and as made". In a three count indictment the defendant was charged with making the following statement on three separate occasions:

> "The President ought to be shot and I would like to be the one to do it."

In answering the defendant's contention that the threat must have been communicated or intended to be communicated to the President, the court stated:

> "The counsel for the defendant fails to distinguish between *threats made for the purpose* of inducing action or non-action on the part of the person against whom they are directed, and threats not made for that purpose, but *calculated* to breed

> disloyalty or hostility in the community to the constituted authorities and incite a spirit of unrest and sedition . . . . The question whether the threat has the tendency to cause action or non-action on his part is wholly foreign to any proper consideration of a given case. *The vital enquiry* under the Act is whether the threat is of *such a nature as to create or tend to create* sedition or disloyalty, or to stir up violence toward or resistance to the lawful authority of the President . . - . ."

After quoting the passage from *Stickrath* set out above, the District Court of Delaware emphasized the substantive evil at which the statute was directed by sustaining a demurrer on the grounds that the indictment failed to name any person or persons who heard the utterance. At page 695 the Court held:

> "In an oral threat contemplated by the statute there are two essential elements: First, the utterance of the words and secondly, the hearing of the words by some person or persons other than the utterer. The use of the threatening language in an unheard soliloquy, whatever may be the intent or purpose with which they are uttered is not an offense punishable under the Act. *Its manifest purpose was to punish the use of threatening words calculated to enflame or have a sinister influence upon the minds of others* and in case of an oral threat the offense is not complete unless the words are uttered in the hearing of some other person or persons."

Finally, in Ragansky v. United States, 253 F. 643 (7th Cir. 1918) the Court was squarely presented with the question of what constitutes "willfulness" within the meaning of the statute. The 7th Circuit notes that

"the language charged to have been used by defendant *in and of itself* constituted a threat".[17] At page 645 the Court discusses the meaning of the word "willfully" and the reasoning underlying its decision.

> "A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him; . . . .
>
> And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.
>
> Defendant, while conceding that an intention actually to carry out the threat or the President's knowledge of the threat is not essential, contends that the language must be used with an evil or malicious intent to express a sentiment to be impressed upon the minds of persons through which it might create a sentiment of hostility to the security of the President, 'that willfully implies an evil purpose – legal malice'.
>
> . . . . . *his present contention cannot be sustained, if by evil purpose or legal malice, more is meant than an intention to give utterance to words . . . . that is, the expression of a determination, whether actual or only pretended, to menace the President's safety.*

[17] The defendant was charged with making the following statements: "I can make bombs and I will make bombs and blow up the President; I want to make the biggest bomb and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks, and get President Wilson and all the rest of the crooks and blow it up; I would like to make a bomb big enough to blow up the capitol and the President and all the Senators and everybody in it."

> While under some circumstances, the word 'willfully' in penal statutes means not merely voluntarily, but with a bad purpose (citations omitted), nothing in the text, context, or *history* of this legislation indicates the materiality of the hidden intent or purpose of one who, in the presence of others, voluntarily uses language known by him to be in form such a threat, *and who thus, to some extent, endangers the President's life.* U.S. v. Stickrath, supra."

It is obvious that the *Ragansky* test is based on a premise which has not met with favor in this court in succeeding years.

VI.

Beginning in 1919 in a series of cases interpreting the 1917 Espionage Act[18] this Court removed the First Amendment from the four corners of the document in which it was contained and allowed it to assume its proper function in a society where truth is the final authority. Interpreting the Espionage Act against the clear commands of the First Amendment, this Court sustained convictions only after testing the evidence to assure that the defendant had the specific intent to produce a substantive evil which Congress could

[18]Under the 1917 Espionage Act three criminal offenses were created: (1) Whoever, when the United States is at war, shall willfully make or convey false reports . . . with intent to interfere with the . . . success of the military . . . ; and (2) Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty . . . ; or (3) Shall willfully obstruct the recruiting or enlistment services of the United States . . . ; shall be punished by a fine . . . or imprisonment . . .

legitimately prevent. We would once again emphasize that words and ideas, in and of themselves, are not such an evil! Therefore, it can never be a *criminal* offense to intentionally utter words for the purpose of expressing an opinion or criticism, unless it is alleged and proven that the speaker selected the words with the intent to produce a real and substantial harm; and that there was an imminent danger that the utterance could actually produce such a result before deliberation and good counsel could intervene.

In Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919) the defendant was charged with causing and attempting to cause insubordination and obstructing the recruiting of the United States Armed Forces by causing to be published and circulated a pamphlet denouncing the Conscription Act.

Justice Holmes, in delivering the court's opinion noted at page 294:

> "The document *would not have been sent unless it had been intended to have some effect,* and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. . . . .
>
> * * * *
>
> But it is said, suppose that was the tendency of this circular, it is protected by the First Amendment to the Constitution . . . . But the character of every act depends upon the circumstances in which it is done. (Citation omitted) . . . The question in every case is whether the words used are used in *such circumstances and are of such a nature* as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a

> question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hinderance to its effort that their utterance will not be endured . . . If the act, (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we preceive no ground for saying that success alone warrants making the act a crime."

In *Frowerk v. United States*, 249 U.S. 204, 205, 39 S. Ct. 294, 250, 63 L.Ed. 561 (1919) the court again held that on the record before them it was "impossible to say that it might not have been found that the circulation of the papers was in quarters where a little breath would be enough to kindle a flame and *that that fact was known and relied upon* by those who sent the paper out".

In *Debs v. United States*, 249 U.S. 211, 39 S. Ct. 252, 63 L.Ed. 566 (1919) the defendant was again charged with obstructing or attempting to obstruct the recruiting and enlistment in the service of the United States. In affirming the conviction Justice Holmes again notes the immediate dangers existing during times of war and finds:

> "The jury was most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had, as their natural tendency and reasonably probable effect, to obstruct the recruiting service, *and unless the defendant had the specific intent to do so in his mind.*"

Justice Holmes, author of the majority opinions in the first three cases, broke with the court in Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17 (1919). The

defendants were Russian emigrants charged with conspiracy to urge, incite and advocate curtailment of production of ammunition necessary to the prosecution of the war. The alleged illegal conduct was the printing and circulating of posters which (1) stated opposition to allied intervention in the Russian war, and; (2) exhorted Russian born factory workers to call a general strike.

The majority opinion emphasized the inflammatory and hostile nature of the language used, as well as the considerable efforts made by the defendants and their seriousness for the cause. Citing *Schenck*, supra, as authority the majority held that:

> "men must be held to have intended and to be accountable for the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian revolution, the plan of action which they adopted necessarily involved, before it could be realized, the defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid in goverment loans and not to work in ammunition factories, . . .[19]

In one of Justice Holmes' most famous dissents, he attacked the reasoning which permitted the imposition of a twenty year sentence where it was not shown that the act was done with the specific intent to curtail the production of ammunition, nor that any such effect was desired or likely to obtain.

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[19]250 U.S. at page 621, 40 S. Ct. at page 19.

". . . but when words are used exactly (speaking of the Statute), a deed is not done with intent to produce a consequence unless a consequence is the aim of the deed. . . . he does not do the act with the intent to produce it unless the aim to produce it is the proximate motive of the specific act. . . ."[20]

To Justice Holmes the obvious purpose of these posters was to place in the competitive market of ideas the opinion that the United States should not intervene in the Russian war. Only if and when this idea was accepted would the exhortations to call a general strike be acted upon. As he was later to point out – "Every idea is an incitement. It offers itself for belief and if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."[21]

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[20]Ibid, 250 U.S. at p. 627, 40 S.Ct. at p. 21.

[21]Gitlow v. New York, 268 U.S. 652, 673, 45 S.Ct. 625, 632, 69 L.Ed. 1138 (1925); (J. Holmes, dissent);

Compare: "yet to assimilate agitation legitimate as such with direct incitement to violent resistence is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free Government." *Masses Publishing Company v. Patten,* 244 F. 535, 539 (1917) (J. Learned Hand); Also see *Dennis v. U.S.,* 341 U.S. 494, 507, 71 S.Ct. 857, 866, 95 L.Ed. 1137 (1951): "Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined towards the Holmes-Brandeis rationale."; J. Frankfurter concurring in *Dennis*: "But it would be disingenious to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision." 341 U.S. at 541, 71 S.Ct. 884.

And, more importantly to Justice Holmes was the simple fact that these expressions of opinion were not of the nature to incite immediate response without allowing our political processes of discussion and deliberation to assume their proper function.

"The United States constitutionally may punish speech that *produces or is intended to produce* a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace. . . .

But as against dangers peculiar to war as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion. . . . Congress certainly cannot forbid all efforts to change the mind of the country. Now nobody can suppose the surreptitious publishing of a silly leaflet by an unknown man without more would present any immediate danger that its opinion would hinder the success of the Government arms, *or have any appreciable tendency to do so. Publishing* those opinions *for the very purpose* of obstructing however, might indicate a greater danger and *at any rate would have the quality of an attempt.* So I assume that the second leaflet, *if published for the purposes alleged* in the fourth count might be punishable. *But it seems pretty clear to me that nothing less than that would bring these papers within the scope of the law.*"

Applying these principles to the case before us today, it is obvious that the Government's conviction is not sustainable on it's faint argument that utterances made

with an apparent determination "might incite others" to harm the President. To suggest that petitioner's statements had any tendency to incite his unwilling listeners to inflict bodily harm upon or take the life of the President would clearly not be supported by the evidence or common sense. It is equally obvious that the statements were not made for that purpose as there was no attempt to influence or even suggest that his listeners should do anything.[22]

VIII.

Unless we are to stop here and conclude that the Government's case is solely based on unwarranted fears, which the First Amendment was in part enacted to protect us from, we must dig deeper in an attempt to find a reasonable ground upon which this conviction could be sustained.

In it's Brief on the Merits, the Government further argued that such utterances "might cause security measures" which would restrict the President's movement and activity in the performance of his duties. We

[22]See *Massess Publishing Co. v. Patten*, ibid at p. 539, where Judge Learned Hand said – "To counsel or advise a man to act is to urge upon him either that it is in his interest or his duty to do it. * * * * The question before me is quite the same as what would arise upon a motion to dismiss an indictment at the close of the proof: Could any reasonable man say, not that the indirect result of the language might be to arouse the seditious disposition, *for that would not be enough*, but that the language directly advocated resistance to the draft?"

would certainly agree that Congress may legitimately enact legislation to prevent such interference; and, under such a statute, criminally punish an individual who acts with the specific intent to produce such a result.

However, it must be recognized that a *mechanical application* of the *Ragansky* test is no more sustainable under this argument than under the old "devilment" theory. Here, as elsewhere,

> "We must interpret the language Congress chose 'against the background of a profound national commitment to the principle that (discussion) on public issues should be uninhibited, robust and wide open. . . .' "[23]

Therefore, when the utterance sought to be made criminal is in form a use of pure speech, whether to air one's views, voice an opinion (even critical) or express a fear (even irrational), we must be ever alert lest we unwittingly punish a man for what he believes and not for what the statute intends.

Today the Government has not argued that petitioner's utterances were made with an intent or under such circumstances that they would tend to coerce or restrict the President in the performance of his duties. Obviously, the evidence would not support such a conclusion.

In this connection, we note the dissimilarity between the facts presented herein and those found in Roy v. U.S., 416 F.2d 874 (9th Cir., 1967), cited by the Government and the Fifth Circuit as blanket authority for the *Ragansky* test.

[23]Watts v. U.S., 394 U.S. 705, 708, 22 L.Ed. 2d 664, 667, 89 Sup. Ct. 1399.

In *Roy*, the defendant was stationed at Camp Pendleton Marine Base. A *few hours before the President was expected to arrive* the defendant phoned a telephone operator and threatened to kill the President. The defendant's utterance was not prefaced by political opinion nor was it part of any attempted discussion about Executive policies.[24] Certainly such an utterance, in the form of an anonymous phone call and only hours before the President was expected to arrive, presents an imminent danger of curtailing the President's freedom of movement. As the Ninth Circuit correctly held:

> "*Under these circumstances*, regardless of whether Roy later stated that the threat was a joke, it appears that the court below was not in error in finding that Roy knowingly and willfully threatened the life of the President." *Roy*, ibid, at p. 878.

IX.

Thus, as briefly as possible, we have reviewed all of the hypothetical situations upon which the present conviction is sought to be sustained. Certainly these utterances were not intended to incite others to harm the President, nor restrict or coerce him in the performance of his duties. Equally certain, no reasonable man could argue that petitioner had any intention of executing the acts he described. And, obviously, even

[24]The Ninth Circuit notes that Roy did not raise the First Amendment and to the Court there did not appear to be a free speech issue. *Roy* ibid at p. 879.

if such an intent had been shown, or necessarily inferred from petitioner's conduct, it could hardly be argued that these utterances were of such a nature as to produce any of the substantive evils at which the statute is directed.[25]

But the frightening aspect of this case is the fact that the Government has never even deemed it necessary to allege or attempt to prove that petitioner's utterances were made for the purpose of or had any remote tendency to produce the evils envisioned. It was deemed sufficient to show that the statements were merely uttered one morning as part and parcel of an attempt to communicate thoughts and in the presence of unwilling listeners. The standard of guilt is a test announced during 1918 when the statute was assumed to be a deterrent for the evil-minded and wickedly disposed and founded on the belief that utterances made with an apparent determination might put "devilment" in the minds of others. Modern authorities are cited, but on review they adequately disclose that the apparent determination with which the utterance was made constituted a true threat only in light of, and when considered in conjunction with, other facts and

[25]See Dennis v. U.S., 341 U.S. 494, 581, 71 Sup. Ct. 857, 903, 95 L.Ed. 1137 (1951), where Justice Douglas begins his dissent with these simple observations: "If this were a case where those who claimed protection under the First Amendment were *teaching the techniques* of sabotage, the assassination of the President, . . .the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; . . .This case was argued as if those were the facts. The *argument* imported much seditious conduct into the record. . . .But the fact is that *no* such evidence was introduced at the trial.

circumstances found to be present. The heart of the Government's case today, using that word loosely, is that the *Ragansky* test is determinative because Congress has predetermined that such utterances, without more, are inimical to the President's safety and freedom of movement.

The Government would apparently agree with the *Ragansky* court that nothing in the *history* of the legislation suggests that Congress intended to punish only those who willed that their utterances have the effect of a threat or, at least, have some appreciable tendency to produce a substantive evil at which the Statute is directed. The Government attempts to sustain this contention by quoting the following portions of the Report of the House Committee on the Judiciary, accompanying the Bill which became law; H. Rep. No. 652, 64th Cong., 1st Sess. (1916):

> "It is the first and highest duty of a government to protect its governmental agencies, in the performance of their public services, from *threats* of violence *which would tend to coerce them or restrain* them in the performance of their duties."

Continuing in their Brief, the Government asserted:

> "The intention of Congress in adopting this Statute can be seen in the words of Mr. Webb, sponsor of the Bill, 'we want to prevent the *threats which* often *incite* men to kill and murder'."

As our underscoring emphasizes, the quotes submitted by the Government to sustain their contention only serves to illustrate their continual failure to draw the proper distinction. It is obvious from the passages

above, as well as the more complete report of the House debate set out below, that Congress intended to punish only those utterances which, under the circumstances and in the context used, had the character and quality of a threat.

Despite the prestations of the Government, it is submitted that the following discussion between the sponsor of the Bill, Senator Webb, and other members of the Senate reported in *Vol. 53, Cong. Records 9377 through 9379* (1916) adequately discloses the constitutionality of the legislative intent.

Mr. Webb: . . .I can say to my friend that threatening letters have come in the White House mail, and something ought to be done in the way of protecting the Chief Executive . . . . from this kind of annoyance.

Mr. Webb: A bad man can make a public threat, and put somebody else up to commiting a crime. . . . The man who makes the threat is not himself very dangerous, but he is liable to put devilment in the mind of some fellow who does try to harm him.

Mr. Raker: (Suggests they strike the word willfully from the statute).

Mr. Webb: I do not think so, Mr. Speaker. I think he ought to be shown to have done it willfully. I think it must be a willfull intent to do serious injury to the President. If you make it a mere technical offense, you do not give him much of a chance when he comes to answer before a court and jury. I do not think we ought to be

too anxious to convict a man who does a thing *thoughtlessly*. . . .

Mr. Webb: This is the language used in nearly all the statutes where the intent constitutes the crime. You find it in the statutes against murder and embezzlement. . . .

Mr. Volstead: . . . .The word "willfully" adds an intention to threaten . . . .

Mr. Volstead: The suggestion I want to make to the gentlemen is this, that if this statute is to be saved at all, it seems to me it must be upon the theory that the act is willful. There is not anything in the language outside of that word to convey the idea that a threat must be an *intentional threat* against the President. The *word willful conveys* as ordinarily used, the *idea of wrongful* as well as intentional. *That idea ought to be preserved* so as not to make innocent acts punishable.

Thereafter, the bill was read and passed substantially in the form it is today.

It is further submitted that even if Congress, at the time the Bill was passed in 1916, had intended to punish all utterances which under some circumstances or in some context could have had the effect of a threat, decisions by this Court from 1919 to the present have expressly held that such an interpretation would render the Statute unconstitutional.

X.

The Government's suggestion that this conviction is sustainable on the basis of Congressional prophetic wisdom is not new and was in fact sustained by this Court in Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 69 L.Ed. 1138 (1925)[26] and Whitney v. California, 274 U.S. 357, 47 Sup. Ct. 641, 71 L.Ed. 1045 (1927).[27]

As this Court well knows, the above decisions were not accorded much favor in the years subsequent to their rendition. Beginning in Herndon v. Lowry, 301 U.S. 242, 57 Sup. Ct. 732, 81 L.Ed. 1066 (1937) this Court refused to accept the contention that the standard of criminal guilt could be made the "danger-

[26] ibid at 268 U.S. 670; 45 Sup. Ct. 631. ". . .In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

* * *

". . .And the general statement in the Schenck case, . . . that the 'question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,' –upon which great reliance is placed in the defendant's argument– was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."

[27] See footnote 22, supra at p. 33.

ous tendency" of his words without appraising the surrounding circumstances of the particular utterance.

In Dennis v. U.S., 341 U.S. 494, 71 Sup. Ct. 857, 95 L.Ed. 1137 (1951) the defendants were charged under the Smith Act with *knowingly and willfully* advocating the necessity or desirability of overthrowing the Government by force or violence. Unlike the case before us today, but similar to all other First Amendment cases, the defendants were well organized and spent considerable effort and time in the advocacy of these opinions.[28] Interpreting the statute the majority held:

> "We hold that the statute requires as an essential element of the crime proof of the intent . . . to overthrow the Government by force and violence."

The majority application of the clear and present danger test must be understood in light of the fears of immediate Communist Revolutions sweeping the nation in the early 1950's. The majority, apparently viewing the seriousness of the defendants for their cause more than the chances of success, held at 341 U.S. 516, 71 Sup. Ct. 871:

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[28]Even under Justice Jackson's narrow interpretation of the scope of the clear and present danger test your petitioner would be protected. "I would save it, unmodified, for application as a 'rule of reason' in the kind of case for which it was devised. When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, . . .it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for a decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam. . . .The formula in such cases favors freedoms that are vital to our society, and, even if sometimes applied too generously, the consequences cannot be grave." Dennis, 341 U.S. 568, 71 Sup. Ct. 897.

> "Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government . . . created a 'clear and present danger' of an *attempt* to overthrow the Government by force and violence."

Next, in Yates v. U.S., 354 U.S. 298, 77 Sup. Ct. 1064 (1957) the Court had before them defendants who were in the lower echelon of the Communist Party and the majority opinion attempted to narrow the broad scope previously given the Smith Act.

> ". . .the District Court appears to have been led astray by the holding in Dennis that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since 'inciting' speech is usually thought of as something calculated to induce immediate action, and since Dennis held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action, is punishable, provided only that it is uttered with a specific intent to accomplish overthrow.
>
> * * *
>
> This misconceives the situation confronting the Court in Dennis and what was held there.
>
> * * *
>
> The essence of the Dennis holding was that . . . .preparation for future violent action, as well as exhortation to immediate action, ...is not constitutionally protected when the group is of sufficient size and cohesiveness . . . and *other circumstances are such as reasonably to justify apprehension* that action will occur."

Thus, it is obvious that members of this Court, just like all other men, will attach to an idea a significance based on their knowledge, fears, predilections and prejudices. The tests applied in the decisions cited do not so much vary with the author, the age or the Court as do the applications.

Finally, in Brandenburg v. Ohio, 395 U.S. 444, 89 Sup. Ct. 1827, 23 L.Ed.2d 430 (1969) this Court expressly overruled the Gitlow-Whitney rationale which permitted convictions on the authority of legislative mandates without proof of a substantive crime.

> "(In 1923) The Court upheld the statute on the ground that, without more, advocating violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. (Citation omitted) But Whitney has been throughly discredited. See Dennis, Supra. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where* such advocacy is *directed* to inciting or producing imminent lawless action *and is likely* to incite or produce such actions."

In a footnote the Court reiterated its holding in Yates, supra, that trial Court instructions must include both elements of an intent and tendency in order to sustain a conviction.

> ". . .the basis for Dennis was emphasized in Yates, supra, in which the Court overturned convictions for advocacy . . . because the trial judge's instructions had allowed conviction for mere advocacy, *unrelated* to its tendency to produce forcible action."

In the case before us today the Government and both lower courts would ignore the principles underlying the decisions outlined and discussed above. Both courts sustained the Government's "case" by interpreting the law to only require that an utterance be made with an apparent determination to execute the act described. The error of logic is quite simply that an utterance in and of itself is not a threat. Words alone can cause no harm, and willfully uttering the language is not equivalent to willfully making a threat against the President. The fact that the utterance was made with an "apparent determination" to put into action the words is merely one of the relevant questions in determining whether, after the utterance, a threat did in fact exist. An affirmative answer to this question does not end the inquiry nor may it alone form the basis for a conviction. As Justice Holmes pointed out in Schenck v. U.S., 249 U.S. at p. 52, 39 Sup. Ct. at p. 248–

> ". . .the character of every fact depends upon the circumstances in which it was done."

CONCLUSION

Congress shall make no law abridging the freedom of speech; nor shall any valid law be so construed or applied.

Respectfully submitted,

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APPENDIX A

INDEXED.

UNITED STATES of America, Plaintiff-Appellee,

v.

George Herman ROGERS, Defendant-Appellant.

No. 73-2094

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1974.

Defendant was convicted in the United States District Court for the Western District of Louisiana, at Shreveport, Benjamin C. Dawkins, Jr., J., for knowingly and willfully making verbal threats to take life of or inflict bodily harm upon President of the United States, and he appealed. The Court of Appeals held that under evidence jury could properly conclude that defendant's conduct satisfied essential elements of the offense, and that statute making it unlawful to make threats against President of United States does not require proof that the defendant actually intended to carry out the threats to kill or harm the President.

Affirmed.

1. Threats – 1(1)

Essential elements of offense of making threats against President of United States are a true threat,

knowingly and intelligently made. 18 U.S.C.A. §871(a).

2. Threats – 1(1)

A true threat, as required by statute making it unlawful to make threats against President of United States, is a serious threat and not words uttered as a mere political argument, idle talk or jest, and full context in which the words were spoken should be considered. 18 U.S.C.A. §871(a).

3. Threats – 1(1)

A threat is knowingly made, as required by statute making it unlawful to make threats against President of United States, if the maker of it comprehends the meaning of the words uttered by him. 18 U.S.C.A. §§871(a), 4208(a)(2).

4. Threats – 1(1)

A threat is willfully made, as required by statute making it unlawful to make threats against President of United States, if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat. 18 U.S.C.A. §§871(a), 4208(a)(2).

5. Homicide – 92

Threats – 1(1)

In order to violate statute making it unlawful to make threats against President of United States, the defendant must intelligently make a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or take life of the President, and the statement must not be the result of

mistake, duress or coercion. 18 U.S.C.A. §§871(a), 4208(a)(2).

6. Homicide – 92

Threats – 1(1)

Statute making it unlawful to make threats against President of United States does not require proof that the defendant actually intended to carry out the threats to kill or harm the President. 18 U.S.C.A. §§871(a), 4208(a)(2).

Appeal from the United States District Court for the Western District of Louisiana.

Before JOHN R. BROWN, Chief Judge, and GODBOLD and SIMPSON, Circuit Judges.

PER CURIAM:

Appellant was convicted on each of five counts of an indictment under 18 U.S.C.A. § 871(a) for knowingly and wilfully making verbal threats "to take the life of or inflict bodily harm upon the President of the United States." He was sentenced to five years imprisonment (the maximum sentence available) on count one with parole eligibility to be determined by the Parole Board pursuant to §4208(a)(2) and to five years imprisonment on each of the other four counts to run concurrently but with sentence suspended on these four counts during good behavior with a five year supervised probation period to commence after the expiration of the confinement sentence.[1] We affirm.

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[1] Appellant was required to join and actively participate in Alcoholics Anonymous as a condition of probation.

On March 24, 1972, at about the time of President Nixon's trip to China, appellant, with a long history of chronic alcoholism, entered a Holiday Inn restaurant in Shreveport, Louisiana at 6 a.m. and made statements which were regarded as a threat on the life and limb of the President. The local police were summoned and appellant was taken briefly into custody at which time he made further threatening statements. The local police turned appellant over to the local Veterans Administration hospital although it is unclear whether the hospital was ever aware of the fact. Not until seven days later was appellant arrested on a federal warrant.

[1-6] Appellant challenges the sufficiency of the evidence as well as the propriety of the legal standard applied by the trial court. On the evidence presented, the jury could properly conclude that on each count appellant's conduct satisfied both essential elements of the offense–(1) a true threat,[2] (2) knowingly and intelligently made.[3]

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[2]The District Court instructed the jury that "a true threat, as required by the statute, is a serious threat and not words uttered as a mere political argument, idle talk or jest. The full context in which the words were spoken should be considered."

[3]The Court further instructed the jury

"A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is wilfully made if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat.

Before you convict defendant under this statute you must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States, and you must be further convinced beyond a reasonable doubt that the statement was not the result of mistake, duress or coercion. However, the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President."

The District Court's instructions on the law are literally in accord with the precedents of the majority of Circuits which have construed the statute. See, e.g., Roy v. United States, 9 Cir., 1969, 416 F.2d 874. And in approving them we reject appellant's importunities that we adopt the holding of United States v. Patillo, 4 Cir. (en banc), 1971, 438 F.2d 13 affirming 431 F.2d 293 to the effect that "where * * * a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made *with the present intention* to do injury to the President." (Emphasis added). We decline to do so and instead follow the great majority of the Circuits which have held that it is not necessary to prove an intention to carry out the threat under §871(a). See Watts v. United States, 1968, 131 U.S.App.D.C. 125, 402 F.2d 676, reversed on other grounds, 1969, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664.

Since *Watts*, the Second, Sixth, Ninth and Tenth Circuits have emphasized that an intention to carry out the threat is not required under the statute. United States v. Compton, 2 Cir., 1970, 428 F.2d 18, cert.

denied, 401 U.S. 1014, 91 S.Ct. 1259, 28 L.Ed.2d 551; United States v. Lincoln, 6 Cir., 1972, 462 F.2d 1368, cert. denied, 409 U.S. 952, 93 S.Ct. 298, 34 L.Ed2d 224; Roy v. United States, 9 Cir., 1969, 416 F.2d 874; United States v. Hart, 10 Cir., 1972, 457 F.2d 1087, cert. denied, 409 U.S. 861, 93 S.Ct. 150, 34 L.Ed.2d 108.

Of course under F.R.Crim.P.Rule 35, appellant may, within 120 days of the issuance of our mandate, seek a reduction of the stringent sentences imposed in the District Court.

Affirmed.